No. 380

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

EDWIN B. COVEY, Committee of the Person and Property of NORA BRAINARD, an Incompetent,

Appellant,

—against—

TOWN OF SOMERS,

Appellee,

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

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MOTION TO DISMISS

Appellee moves to dismiss the appeal on the ground (a) that the appeal does not present a substantial federal question, (b) that the alleged federal question sought to be reviewed was not properly raised below, and (c) that the judgment rests on an adequate non-federal basis.

Statement of the Case

This proceeding was originally instituted on May 8, 1952, pursuant to Title 3 of Article 7-A of the Tax Law of the State of New York, entitled "Foreclosure of Tax Lien by Action in Rem," for tax arrears accruing more than four years prior thereto.

On that date, publication was begun of a notice of foreclosure, in the Westchester Post and The Record, publications serving the Town of Somers, the appellee herein.

On September 8, 1952, judgment of foreclosure was entered herein; and on or about October 24, 1952, a deed to the property owned by Nora Brainard was delivered to the Town of Somers, and duly recorded in the Office of the Clerk of the County of Westchester, Division of Land Records.

It was not until after the *in rem* proceeding had been concluded that Nora Brainard was admitted to the Harlem Valley Hospital, November 6, 1952, as a person of unsound mind, by an order of the County Court, County of Westchester, dated October 29, 1952.

The appellant was appointed Committee of Nora Brainard on January 30, 1953, by an order of the County Court of the County of Westchester.

The instant motion was made in October, 1953.

Argument on Motion to Dismiss

(a) The appeal does not present a substantial federal question.

The constitutionality of this very statute was presented to this Court in two prior actions and certiorari denied in each case.

City of New Rochelle v. *Echo Bay Waterfront Corp.*, 268 A. D. 182, 49 N. Y. S. 2d 673, aff'd 294 N. Y. 678, cert. den. 326 U. S. 720;

Lynbrook Gardens v. *Ullman*, 291 N. Y. 472, cert. den. 322 U. S. 742.

If the test of constitutionality suggested by appellant is correct, namely, that the right of the Town of Somers to collect tax arrears by *in rem* proceedings is dependent on proof that the Town did not know of the taxpayer's incompetency, it would mean that real estate titles would be in a chaotic state for years.

In this case, the tax became a lien on the property in April 1948. The *in rem* action was instituted more than four years later, May 8, 1952. Judgment of foreclosure was entered September 8, 1952, and the deed to the property delivered to the Town October 24, 1952. It was not until November 6, 1952, that Nora Brainard was admitted to the Harlem Valley Hospital. It was not until January 30, 1953, that the appellant was appointed Committee of the incompetent. When she was judicially declared an incompetent does not appear from the record; but, presumably, it was sometime between November 6, 1952 and January 30, 1953, years after the lien had first attached to the property and sometime subsequent to the delivery of the deed to the Town.

Actually, there is no evidence in the record that the Town officials had knowledge of the incompetency at the time the action was instituted or even when the deed was delivered to the Town on October 24, 1952. The attorney for the Committee made an affidavit on October 21, 1953, a year later, that "from conversations had with the duly elected officials" (names not given) "of the Town of Somers, I am of the opinion that the said Nora Brainard was and has been an incompetent for more than 15 years" (fols. 19-20). This is not tantamount to saying that the Town officials had this knowledge for fifteen years, or when the proceeding was instituted in May 1952, or when

judgment was entered on September 8, 1952 or when the deed was delivered October 24, 1952. In fact, it is no evidence at all of incompetency, which is a matter for determination by a competent physician and not the responsibility of tax collection officials of a municipality. Further, it is significant that when an attempt was made to commit Nora Brainard to a mental institution two years previous, it was unsuccessful (fol. 20).

In any event, it is well settled that unless especially favored by statute, persons under disabilities have no longer time than other persons within which to redeem their lands from tax sale.

85 Corpus Juris, Secundum, Sec. 582c.

The "same strict rules" which apply to the ordinary taxpayer in the case of redemption, also apply to infants and other persons under disability.

Cooley's Law of Taxation, 4th Ed., Vol. 4, Sec. 1563, p. 3071.

The right of redemption is exclusively statutory and can only be claimed in the cases and circumstances prescribed in the statute. Courts cannot extend the time or make any exceptions not made by statute. Redemption cannot be had in equity, except as it may be permitted by statute, and then only under such conditions as the statute may attach.

Keely v. *Sanders*, 99 U. S. 441, 445, 446;
Bank of the State of Alabama v. *Dalton*, 9 How. 522;
Levy v. *Newman*, 130 N. Y. 11, 13, 14;
Johnson v. *Smith*, 297 N. Y. 165, 171.

Tax foreclosures are *in rem* and not against the person of the owner of the property.

Ontario Land Co. v. *Yordy*, 212 U. S. 152, 158.

It is the land that stands accountable to the demands of the state, and the owners are charged with the laws affecting it and the manner by which those demands may be enforced. A statute providing for constructive service does not violate the due process clause of the United States Constitution or deny such owners the equal protection of the laws.

Ballard v. *Hunter*, 204 U. S. 241, 254, 255.

The process of taxation does not require the same kind of notice as is required in an action at law, or even in proceedings for the taking of private property under the power of eminent domain. These are proceedings which have regard to the land itself, rather than to the owners of the land. Constructive notice is good as against the world.

Leigh v. *Green*, 193 U. S. 79, 89, 90, 91.

The payment of taxes must necessarily be enforced by summary and stringent means, and to do this successfully other instrumentalities and modes of procedure are necessary than those which belong to the courts.

State Railroad Tax Cases, 92 U. S. 575, 614;
Murray's Lessee v. *Hoboken Land & Improvement Co.*, 18 How. 272, 281, 282.

The proceedings by which taxes for governmental purposes have been assessed, levied and collected from the citizen have always been regarded as administrative and

not judicial in their character. Such proceedings have from necessity been exercised by governments, by summary methods and procedure. These methods were in exercise and existence long before the adoption of the Constitution and have never been supposed to be affected thereby.

McMahon v. *Palmer*, 102 N. Y. 176, 189, aff'd 133 U. S. 660.

If a judicial agency is used for some part of the process of collection of taxes, it is not because required, but convenient. It is entirely a matter for legislative determination. The tax collecting function is still administrative and remains such even though judicial forms are applied in the process.

Phillips v. *Commission*, 283 U. S. 589; *Protestant Episcopal School* v. *Davis*, 31 N. Y. 574.

(b) The record before the Court of Appeals did not properly raise a federal question.

Mere reference to unconstitutionality without specifying the Federal Constitution has been held to be referable to the State Constitution.

Bowe v. *Scott*, 233 U. S. 658, 664, 665

The Constitution of the State of New York contains due process and equal protection of laws clauses (*New York Constitution*, Article 1, Sections 6 and 11).

Even though there had been a general reference to the Federal Constitution, it would have been insufficient to confer jurisdiction upon this Court.

Herndon v. *Georgia*, 295 U. S. 441, 442, 443.

(c) The judgment rests upon an adequate non-federal basis.

The opinion of the County Court, rendered in December 1953, gave notice to the incompetent's committee, the appellant, that the procedure adopted by the committee was improper, in that Section 165-h, subd. 7, of the Tax Law of the State of New York required the institution of an action to set aside the deed and the filing of a notice of pendency of such action (fol. 51). The Committee had improperly proceeded by motion in the *in rem* action instead of proceeding by action and *lis pendens* as required by the Statute.

The Committee had two years from the delivery of the deed and until October 24, 1954 to institute the appropriate action (Tax Law, Section 165-h, subd. 7, printed at page 37 of the Jurisdictional Statement). When apprised of the proper procedure by the opinion of the County Court in December 1953 the Committee still had more than ten months to comply. Nevertheless, the Committee failed and refused to comply with the statute.

The judgment rests upon an adequate non-federal basis since the incompetent's committee cannot now be heard to complain, in view of his own failure to comply with the statutory provision, even after it had been directly called to his attention. Under the circumstances, there could be no lack of due process or violation of the equal protection of laws clause of the Federal Constitution.

For the foregoing reasons the appeal should be dismissed.

Respectfully submitted,

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